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No. 93-1880

In The

Supreme Court of the United States

October Term, 1994

THE CITY OF CASTLE ROCK, and
GILBERT R. VAUGHN, in his
Official Capacity and Individually,

Petitioners,

v.

MICHAEL D. HUSON,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Plaintiff's Statement of the Case is argumentative, misleading and, in some instances, not supported by the Record. Because the issues in this case are legal rather than factual, Defendants will not address each of the factual errors. However, because Plaintiff indicates that Defendants were inaccurate regarding certain facts and because Plaintiff also intermingled facts not learned until after Plaintiff's arrest with those known at the time of the arrest, even though the question of entitlement to qualified immunity is based only on facts known at the time of the arrest, Defendants will address those inaccuracies.

Plaintiff contends that Carl Lorton was in the yard when Carrol Woodworth delivered the money. (Pl Br 3) Plaintiff ignores the fact that neither he nor Woodworth told anyone prior to Plaintiff's arrest that the boys were in the yard. Any information to that effect was not provided until *after* Plaintiff's arrest. (Tr III-222, 279)

Plaintiff contends that the "tally note" contained a tally that corresponded in amount and denominations with the stolen funds. (Pl Br 4) However, there was *no* evidence that anyone knew how much money was in the bag. Plaintiff admitted that he had not counted it, that someone else had counted only the 20s, and that even those were counted before Plaintiff left the concession stand, which was long before it closed. (Tr III-231)

Plaintiff contends that Vaughn told personnel at the Boys Ranch that Lorton was not a suspect. (Pl Br 5) There was *no* such evidence. The person who wrote the note indicating that Lorton was not a suspect testified that (1) she did not remember who gave her the information, (2) it probably came from one of Lorton's former case workers, and (3) she did not remember Vaughn *ever* saying that Lorton was not a suspect. (Tr III-362-63)

Plaintiff contends that Vaughn failed to disclose certain information to Prosecutor Furman. (Pl Br 7-9) Plaintiff ignores the fact that much of the information was not learned

until *after* his arrest. As discussed above, no one told Vaughn that the boys were in the yard when the money was delivered. Vaughn's report that Plaintiff was not as involved in Lion's Club activities after the theft was based on Woodworth's statement. Vaughn had no reason to suspect that Woodworth, who was Plaintiff's friend, would lie, and no contrary information was provided until *after* the arrest. Furthermore, both Plaintiff and Woodworth testified at trial that Plaintiff attended coffee sessions less often, thus confirming the information given to Vaughn and told to Furman. (Ex 1-S, Tr III-267-68, IV-637)

Plaintiff contends that Vaughn misled Furman to believe that Vaughn was following up on Lorton's "excuses." (Pl Br 8-9) Vaughn did follow up. He interviewed Alex Neal, who confirmed that Lorton had said that he was going to see Flores[1] and that Lorton had left behind the boom box and tapes that Plaintiff later placed at the food bank. Vaughn also attempted to locate Flores. He found a Martin Flores in the phone book, went to the address indicated, and found that it was in an area similar to that described by Lorton. Vaughn also attempted to obtain Lorton's bank records, which indicated that Lorton had made a withdrawal in the time frame indicated. (Tr II-75-77, 81, 91-93, III-266-67, IV-585-86)

Plaintiff contends that the handwriting analysis of the "tally note" conclusively established that Plaintiff did not write the note and eliminated him as a suspect. (Pl Br 10) The report actually states that Plaintiff *probably* did not write the numerals on the note. (Ex 25-B) That statement is neither conclusive nor does it eliminate Plaintiff as a suspect.

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[1] Plaintiff contends that the Record does not support Defendants' statement that Flores told Lorton that Flores might have a job for him or that Lorton left early to see Flores. (Pl Br 9 n 5) Lorton told Vaughn that Lorton had talked to Flores about a job and went to see him before Flores left in the early morning hours. (Tr II-74-75)

REPLY TO RESPONDENT'S ARGUMENTS

I.

The Ninth Circuit erred in affirming the judgment against the City based solely on the arrest made by Vaughn. Municipal liability cannot be based, as it was in this case, on *respondeat superior.* Moreover, the City properly preserved the issue whether municipal liability could be imposed.

The Ninth Circuit erroneously affirmed the Judgment against the City on Plaintiff's claims under 42 U.S.C. § 1983 ("Section 1983"). Because there was no evidence to support a claim against the City based on an express policy, a *de facto* policy, or an action undertaken by a policymaking official acting in his policymaking capacity and involving deliberate disregard of Plaintiff's constitutional rights, the question of municipal liability should not have been submitted to the jury. *See Pembaur v. Cincinnati,* 475 U.S. 469, 486 (1986) (White concurring); *see also St. Louis v. Praprotnik,* 485 U.S. 112, 126 (1988); *Monell v. New York City Dept. of Soc. Serv.,* 436 U.S. 658, 691-94 (1978). The jury instructions allowed the jury to find for Plaintiff on grounds not supported by any evidence.

Plaintiff contends that the City waived its challenge because (1) the City conceded that municipal liability may arise where a policymaking official causes a constitutional injury, (2) there was evidence that Vaughn made some policies, and (3) no one interfered with Vaughn's policymaking authority. (Pl Br 13) Although the City did not challenge the general notion that a city may be held liable for violations caused by a policymaking official acting in his *policymaking capacity* when he undertook the action, the City did challenge the notion that *every* action taken by a person with some policymaking authority is a policymaking decision that may give rise to municipal liability under Section 1983.[2]

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[2] *See* Defs' Motion for Directed Verdict (Tr IV-555, 697); Defs' exceptions to jury instructions (Tr V-706-07); Defs' Motion for JNOV (CR 155 at 2, CR 156 at 11-23).

This Court has made a clear distinction between policymaking decisions and discretionary actions taken within the parameters of an existing policy. The former may subject a city to liability. In the latter case, only the policy itself, and not a discretionary decision, can subject a city to liability. *St. Louis v. Praprotnik*, 485 U.S. at 126; *Pembaur v. Cincinnati*, 475 U.S. at 481-82. It is the latter kind of action that is at issue in this case. Where the policy itself (*i.e.*, the statute governing warrantless arrests) is not unconstitutional and is not the source of the alleged injury, and where the injury is caused by an allegedly erroneous discretionary decision made by a person attempting to comply with the policy, a city may not be held liable. *See St. Louis v. Praprotnik*, 485 U.S. at 126; *Pembaur v. Cincinnati*, 475 U.S. at 481-82.

Thus, although Vaughn had *some* policymaking authority, that does not mean *every* action taken by Vaughn amounted to a policymaking decision sufficient to give rise to municipal liability under Section 1983. The question is whether Vaughn had the authority to make policy with respect to warrantless arrests. Clearly he did not. *See* Wash. Rev. Code § 10.31.100 (1988). Moreover, contrary to Plaintiff's assertion, the Record established that (1) when Plaintiff was Mayor, he routinely challenged Vaughn's "policy" decisions (Exs 3-G, 3-I), and (2) many department policies required approval by the City Council (Tr II-17).

Plaintiff contends that the City waived its appeal regarding the jury instruction by not challenging, at trial or on appeal, the substance of the instruction or the law applied by the District Court. (Pl Br 18) As noted above, the City challenged the law in its motion for a directed verdict, its requested jury instructions, its exceptions to the instructions given, and its motion for a JNOV. The City also challenged the issue on appeal. (Defs' Br 32-40; Pet Reh'g 13-15) In each instance, the City argued that there was no basis for imposing municipal liability and that instructing the jury on

that issue would allow the jury to find against the City on a basis not supported by evidence.[3]

Plaintiff contends that the verdict can be upheld because one theory of liability is supported by the evidence in that it is possible to conclude that the jury found a reckless disregard for Huson's rights because it awarded punitive damages. (Pl Br 18-19) Because Plaintiff bases support for the Judgment on only one of the three basis presented to the jury as grounds for imposing municipal liability, Plaintiff apparently concedes that the other two bases were not supported by the Record.

In any event, Plaintiff misconstrues the issue. The question whether to impose punitive damages on Vaughn is separate from the issue of municipal liability. Even if Vaughn acted with sufficient disregard to justify an award of punitive damages, that does not mean that he was acting in policymaking capacity when he did so. Because Vaughn did not have authority to establish policy contrary to the statute, the question whether he should have been subject to punitive damages is irrelevant to the question of municipal liability.

Finally, Plaintiff contends that the City waived the issue by failing to request that the verdict form include special interrogatories addressing each of the three grounds for liability. (Pl Br 19 n 12) Because none of the bases for imposing municipal liability are supported by evidence, there was no need for the verdict form to include separate interrogatories regarding the three species of municipal liability under Section 1983. The verdict clearly separates out the issues of liability against Vaughn from those of the City. That was sufficient to preserve the issue for the City's appeal.

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[3] Plaintiff's argument that the City did not make the specific point that municipal liability based on reckless disregard has not been applied except where the City itself made a decision not to take an action (Pl Br 18) is disingenuous. The City made clear its position that there was no basis for imposing liability on the ground of reckless disregard. This is not a case where the City is raising a new issue for the first time on appeal. The District Court clearly understood that the City objected to giving any instruction on municipal liability, as well as to the language of the instruction given and the refusal to give the City's requested instructions.

The Ninth Circuit erred in affirming the Judgment against the City, which improperly based liability on *respondeat superior.* The issue was properly preserved and is properly before this Court.

II.

The Ninth Circuit erred in holding that the issue of qualified immunity was for the jury where a reasonable officer could have concluded that there was probable cause to arrest Plaintiff. Moreover, Vaughn properly preserved the question of his entitlement to qualified immunity.

The Ninth Circuit erred in affirming Judgment against Vaughn on Plaintiff's Section 1983 claims. Because an officer reasonably could have concluded that there was probable cause based on the facts known to Vaughn at the time of the arrest, Vaughn was entitled to qualified immunity. *See Hunter v. Bryant,* ___ U.S. ___, 112 S. Ct. 534 (1991).

Plaintiff contends that Vaughn stipulated that the law was clearly established. (Pl Br 11, 20) Plaintiff misrepresents the nature of the alleged "stipulation." Vaughn agreed that probable cause is needed for a warrantless arrest. However, the "clearly established" inquiry must be made with reference to the specific facts of a particular case. *See Anderson v. Creighton,* 483 U.S. 635, 638-40 (1987). Vaughn did *not* stipulate that it was clearly established (1) that there was not probable cause in this case, or (2) that once having obtained sufficient evidence to establish probable cause, Vaughn had an obligation to continue his investigation to determine whether exculpatory evidence was available. It is the latter two questions that are at issue.[4] Vaughn did not stipulate that the law was clearly established as to any alleged violation of Plaintiff's constitutional rights.[5]

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[4] Indeed, the Ninth Circuit based its affirmance on the need to investigate further. (A-12)

[5] *See* Defs' Trial Memo (CR 108 at 18-23); Defs' Motion for Directed Verdict (Tr IV-557; 697); Defs' Motion for JNOV (CR 155 at 2, CR 156 at 23-29); Defs' Supp Memo re: Qualified Immunity (CR 158).

Plaintiff contends that no reasonable officer could have concluded that there was probable cause. (Pl Br 25-30) However, Plaintiff picks and chooses among various pieces of evidence, relying on misstatements about the evidence and on evidence that was *not* known at the time of the arrest. Probable cause and qualified immunity must be evaluated based on information known to the officer at the time of the arrest. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Because Plaintiff's analysis does not follow that rule, the analysis is flawed. Based on the information known to Vaughn at the time of the arrest, he reasonably concluded (1) that there was probable cause to believe that Plaintiff committed the theft and (2) that Lorton no longer should be a suspect.

Plaintiff relies on the fact that at the outset, "everyone" concluded that Lorton was the thief. (Pl Br 25) Simply because a person is considered a suspect early on in an investigation does not make it wrong to rule out that suspect and focus on a new suspect after further investigation, especially where information is voluntarily given to police that indicates a new suspect, and further investigation supports the guilt of the second suspect and the likely innocence of the original suspect.

Plaintiff had a motive (his property was facing foreclosure) and opportunity (he had custody of the money and had refused to secure it the previous day).[6] Plaintiff made cash deposits of over $1,000 shortly after the theft, which the teller at the bank told Vaughn were out of character with Plaintiff's usual banking habits. Plaintiff's own conclusions about his deposits do not change the fact that the teller and Vaughn *reasonably* concluded that they were unusual. Moreover, although bank records did not distinguish between cash and check deposits, the teller provided that information – Plaintiff usually deposited checks, whereas the deposits made

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[6] Although motive and opportunity are not elements of the offense, police officers routinely consider those factors in analyzing the likely culpability of a suspect.

shortly after the theft were in cash. Finally, Plaintiff was unemployed and had no other visible sources of income.

There also was evidence from which Vaughn could infer a consciousness of guilt on Plaintiff's part – Woodworth reported that Plaintiff attended Lion's Club coffee gatherings less frequently after the theft. Plaintiff's reliance on information not provided until *after* the arrest is disingenuous, given the fact that once Vaughn had probable cause there was no clearly established law requiring him to determine whether there was information that might call into doubt statements made by Plaintiff's friend. Moreover, both Plaintiff and Woodworth testified at trial that Plaintiff attended those functions less often.

Lorton and Neal told Vaughn that they were unaware that the money had been delivered and, prior to Plaintiff's arrest, neither he nor Woodworth told Vaughn that the boys were in the yard. Plaintiff erroneously contends that Lorton told Vaughn that Lorton was in the yard "near Huson's car" the afternoon the money was delivered. (Pl Br 30) Lorton told Vaughn only that he had done yard work that afternoon. That does not establish that he was "near" the car, or even in a position to view the car when Woodworth delivered the money.

Moreover, based on Vaughn's experience in police work, he reasonably concluded that it did not make sense for Lorton to risk taking the money back into the house to count it or to return to a nearby town where he was well known, knowing that he was a suspect.[7] Lorton and Neal disputed Plaintiff's statement that Lorton had taken his "boom box" and cassette tapes, and Plaintiff did not return those items to the Boys Ranch. Vaughn reasonably concluded that it did not make

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[7] Plaintiff's after-the-fact analyses of those factors does not change the fact that police officers often must rely on their experience in evaluating the evidence before them. Plaintiff bases most of his arguments on just that kind of police analysis and on what Plaintiff believes police officers routinely do or should do in an investigation, including what he contends is expected of police in terms of conclusions drawn based on their experience.

sense for Lorton to leave behind all of the property that was of apparent value to him if he was running away, and the fact that he left them behind was inconsistent with running away if he were guilty. Plaintiff contends that Vaughn had to be incompetent to think that Lorton had taken the tapes and boom box on his bicycle. (Pl Br 29) However, Plaintiff ignores his own testimony that even he had concluded that Lorton must have gotten a ride in order to take those things with him. (Tr III-230) Moreover, because Plaintiff failed to report that he had found those items and because Plaintiff hid them at the food bank, it is rather incredible for Plaintiff to now attempt to rely on the fact that Lorton had indeed left those items behind.

Lorton voluntarily met with Vaughn, submitted to a taped interview after being given his *Miranda* warnings, and gave a written statement. Based on Vaughn's experience and Lorton's demeanor, Vaughn believed that Lorton was telling the truth about the money. Although Vaughn had doubts about Lorton's complete honesty, Vaughn's further investigation supported much of what Lorton reported. Neal confirmed much of what Lorton had said about his whereabouts, and Lorton previously had told Plaintiff about his intent to seek a tree planting job. Although Vaughn could not locate Martin Fores, the description that Lorton had given of Flores' residence was similar to the one Vaughn found using the phone book, and Neal had confirmed Flores' existence. Lorton's bank confirmed that he had withdrawn money in the time frame involved, which was not called into question by any other evidence until *after* Plaintiff's arrest.

Vaughn's entitlement to qualified immunity could be defeated only if there was a clear absence of reason to believe that he had probable cause – only if, viewed on an *objective* basis, no reasonably competent police officer could have concluded that there was probable cause under the facts and circumstances known to Vaughn at the time of the arrest. If reasonable officers could disagree or if Vaughn reasonably, but mistakenly, concluded that there was probable cause, he was entitled to immunity. *See Malley v. Briggs,* 475 U.S. at 341, 344-45. Based on the evidence that was known at the

time of the arrest, a reasonable officer could have concluded that there was probable cause, and there was no clearly established law requiring Vaughn , once he obtained sufficient information to establish probable cause, to continue his investigation in an effort to obtain exculpatory information. Therefore, Vaughn was entitled to qualified immunity.

CONCLUSION

This Court should grant certiorari and reverse the decision of the Ninth Circuit and the Judgment of the District Court on Plaintiff's Section 1983 claims on the grounds (1) that the Ninth Circuit erroneously extended the rules regarding municipal liability to include liability based on *respondeat superior,* and (2) that the Ninth Circuit erroneously turned the question of qualified immunity into an issue of fact and equated a police officer's entitlement to qualified immunity to a ruling regarding whether there was probable cause to make an arrest.

DATED: August 2, 1994.

Respectfully submitted,

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